

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

**IN RE**

**U.S. STONE, INC.,**

**Debtor.**

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**Case No: 00-46269-BJH-11**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Before the Court is the Debtor's Emergency Motion to Show Cause (the "Motion"). In the Motion, the Debtor U.S. Stone, Inc. (the "Debtor") seeks to require Sioux Aggregates, Inc. ("Sioux Aggregates") to cease its efforts to collect a prepetition claim in violation of the automatic stay, thereby causing certain funds to be released to the Debtor. The Court took evidence and heard argument on the Motion on February 20, 2001. Following the hearing on the Motion, the Court allowed the parties to submit supplemental briefing. Upon review of the Motion, and upon consideration of the evidence and the arguments of counsel, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

**I. FINDINGS OF FACT**

1. On or about March 30, 2000, the Debtor submitted a bid to Collin County, Texas (the "County") to provide the County with "Road Materials: Flexible Base Materials" (the "Material"). *See* Sioux Aggregates Exhibit A.

2. On April 24, 2000, the County's purchasing agent notified the Debtor that the County had awarded the Debtor a contract to provide Material to the County (the "Notice"). *See* Debtor's Exhibit 10; Sioux Aggregates Exhibit B. The Notice provided that "Commodity [the Material] will be ordered on an as needed basis." *See* Debtor's Exhibit 10. The Notice related

solely to the provision of Material – it did not require any services or commitment from the Debtor other than for delivering Material. *See id.* §§ 4.7, 4.8. Further, a representative of the Debtor testified that the Debtor did not contract with the County to make any improvements with the Material, but only to provide the Material to the County.

3. In August, September, and October 2000, the County issued purchase orders to the Debtor for the delivery of Material (the “Prepetition Purchase Orders”). *See* Debtor’s Exhibit 14. Two of the Prepetition Purchase Orders called for the delivery of Material to the “Justice Center.” *See id.* The other Prepetition Purchase Order called for the delivery of Material to a location on a County road. *See id.* The Debtor contracted with Sioux Aggregates to transport or haul the Material to the locations identified by the County. Sioux Aggregates delivered the Material to the sites identified by the County. A representative of Sioux Aggregates testified that on one occasion he witnessed a “County truck” pick up Material which had been provided by the Debtor and deliver it to a site where a County road crew used the Material in road construction. However, the Sioux Aggregates representative also testified that he believed the County was the “prime contractor” on the road project.

4. The Debtor filled the Prepetition Purchase Orders and invoiced the County accordingly. Each of the Prepetition Purchase Orders was paid by the County. The Debtor did not pay Sioux Aggregates for its prepetition delivery or hauling services.

5. On November 17, 2000, the Debtor filed for protection under Chapter 11 of the United States Bankruptcy Code. The Debtor listed Sioux Aggregates as one of its prepetition unsecured creditors. *See* Debtor’s Exhibit 1.

6. In November 2000, subsequent to the Debtor's bankruptcy filing, the Debtor received additional purchase orders from the County for the delivery of Material (the "Post-Petition Purchase Orders"). *See* Debtor's Exhibit 14A. Two of the Post-Petition Purchase Orders called for the delivery of Material to the "Justice Center." *See id.* One of the Post-Petition Purchase Orders called for the delivery of Material to the "Farmersville Stockpile." *See id.* The last Post-Petition Purchase Order called for the delivery of Material to a location on a County road. *See id.* The Debtor did not contract with Sioux Aggregates to transport or haul the Material called for in the Post-Petition Purchase Orders.

7. The Debtor filled the Post-Petition Purchase Orders and invoiced the County (the "Post-Petition Invoices").

8. On December 6, 2000, prior to being notified of the Debtor's then pending bankruptcy case, Sioux Aggregates served the Debtor and the County with a demand for payment (in the amount of \$88,378.48) and notice of lien claim (the "Demand"). *See* Debtor's Exhibits 4, 5, and 6. In the Demand, Sioux Aggregates informed the County that Sioux Aggregates was demanding payment of its claim against the Debtor, and that it believed the County was "authorized to withhold funds [from the Debtor] pursuant to Chapter 53 of the Texas Property Code." *See* Debtor's Exhibit 4.

9. On December 12, 2000, the Debtor notified all of its creditors of its pending bankruptcy case. *See* Debtor's Exhibit 2. Sioux Aggregates received this notice. The Debtor notified Sioux Aggregates of the pendency of its bankruptcy case again on December 22, 2000. *See* Debtor's Exhibit 3. On both occasions, Sioux Aggregates refused to withdraw the Demand and continued in its efforts to collect its prepetition claim.

10. On January 17, 2001, the County wrote a check payable to the Debtor for \$53,145.84 in partial satisfaction of the Post-Petition Invoices. *See* Debtor's Exhibit 17. However, the County refused to release the check to the Debtor as a result of the Demand.

11. On January 22, 2001, the Debtor learned that the County was refusing to release the January 17, 2001 check. The Debtor again notified Sioux Aggregates of its pending bankruptcy case. *See* Debtor's Exhibit 9. Sioux Aggregates refused to withdraw the Demand.

12. On January 24, 2001, the Debtor filed the Motion seeking to compel a release of the checks being held by the County.<sup>1</sup>

13. On January 31, 2001, the County wrote another check payable to the Debtor, this time for \$192,677.84, again in partial satisfaction of the Post-Petition Invoices. *See* Debtor's Exhibit 17. However, the County again refused to release the check to the Debtor because of the Demand. Thus, as a result of the Demand, the County was holding checks payable to the Debtor totaling \$245,823.68 (collectively, the "Post-Petition Checks").

14. The Debtor approached both Sioux Aggregates and the County about the possibility of releasing the undisputed portion of the Post-Petition Checks to the Debtor pending a resolution of the Motion. *See* Debtor's Exhibit 12. While the County agreed to such an arrangement, *see* Debtor's Exhibit 13, Sioux Aggregates would not agree. Subsequently, the County released the undisputed portion of the Post-Petition Checks to the Debtor, despite having no agreement with Sioux Aggregates.

15. Any Finding of Fact may be deemed a Conclusion of Law.

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<sup>1</sup>On February 20, 2001, the day of the hearing on the Motion, the County filed a Petition in Interpleader, seeking to deposit the remaining disputed funds into the registry of the Court. *See* Petition in Interpleader. At the hearing on the Motion, the County agreed instead, with the consent of the parties, to hold the disputed funds until the Motion is decided by the Court.

## **II. CONCLUSIONS OF LAW**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding over which the Court may enter a final judgment. *See* 28 U.S.C. § 157(b)(2).

2. Upon a debtor's filing for bankruptcy, section 362 of the Bankruptcy Code automatically stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"; "any act to create, perfect, or enforce any lien against property of the estate"; and "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title." *See* 11 U.S.C. §§ 362(a)(3), (4) and (5).

3. Excepted from the automatic stay are, among other things, any acts "to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title." *See* 11 U.S.C. § 362(b)(3). Section 546(b)(1), in turn, provides that the rights of the trustee are subject to any generally applicable law that "(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or (B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation. *See* 11 U.S.C. § 546(b)(1).

4. Sioux Aggregates contends that its attempts to perfect its lien fall under either section 2253.027 of the Texas Government Code or section 52.231 of the Texas Property Code

and that its lien (i) is protected against avoidance by the trustee (or debtor-in-possession), and (ii) may be perfected post-petition without first obtaining stay relief pursuant to section 362(b)(3) of the Bankruptcy Code. The Debtor contends that neither of the state statutes relied upon by Sioux Aggregates is applicable; and therefore, section 362(b)(3) of the Bankruptcy Code does not except Sioux Aggregates' actions from the automatic stay.

5. The Texas Government Code provides that a “governmental entity that makes a public work contract with a prime contractor shall require the contractor, before beginning the work, to execute . . . a payment bond if the contract is in excess of \$25,000.” *See* TEX. GOV'T. CODE § 2253.021(a)(2). To the extent a governmental entity fails to obtain such a bond from a prime contractor, “a payment bond beneficiary is entitled to a lien on money due to the prime contractor in the same manner and to the same extent as if the public work contract was subject to [certain provisions of the Texas Property Code].” *See* TEX. GOV'T. CODE § 2253.027(2). The relevant provision of the Texas Property Code provides that “a person who furnishes material or labor to a contractor under a prime contract that does not exceed \$25,000 and that is for public improvements in this state . . . has a lien on the money, bonds, or warrants due the contractor for improvements.” *See* TEX. PROP. CODE § 52.231.

6. The Texas Government Code also states that payment bonds exist for the sole benefit of “payment bond beneficiaries who have a direct contractual relationship with the prime contractor.” *See* TEX. GOV'T. CODE § 2253.021(c)(1). The Texas Government Code defines “payment bond beneficiary” as “a person for whose protection and use this chapter requires a payment bond.” *See* TEX. GOV'T. CODE § 2253.001(2). A “prime contractor” is defined as “a person, firm, or corporation that makes a public work contract with a governmental entity.” *See*

TEX. GOV'T. CODE § 2253.001(3). A “public work contract” is a “contract for constructing, altering, or repairing a public building or carrying out or completing any public work.” *See* TEX. GOV'T. CODE § 2253.001(4). The term “public work” is somewhat circularly defined as including “the construction, alteration, or repair of a public building or the construction or completion of a *public work*.” *See* TEX. GOV'T CODE § 2252.031 (West 1993) (emphasis added). However, the term has received some treatment in the Texas courts. Specifically, relying on the plain meaning rule, *see* TEX. GOV'T CODE § 311.011 (West 1985), and the doctrine of *ejusdem generis*, at least one state court observed that the term “public work” was meant to “embrace those contracts akin to building contracts.” *See Employers' Cas. Co. v. Stewart Abstract Co.*, 17 S.W.2d 781, 782 (Tex. Comm'n App. 1929, judgm't adopted). That court went on to say that the terms “construction” and “repair,” as used in the definition of public works, are “apt in building, and other structural, contracts *but [are] inapt to those contracts which are essentially for services, supplies, equipment and the like*.” *See id.* (emphasis added). Finally, the court posited that “[t]he construction of a county road is a public work, but it could hardly be said that a contract for a road grader would be a public work. Such a grader would be in the nature of equipment or supply.” *See id.*; *see also Acratod Co. v. Housing Authority for the City of Houston*, No. 01-98-00039-CV, 1999 WL 82450 (Tex. App. February 11, 1999, no writ) (citing *Employers' Casualty* and finding that a contract to develop and implement a records retention schedule, a disaster recovery plan, and a storage solution for old records was a contract for professional services and was not public works contract).

7. Sioux Aggregates cannot avail itself of the statutory protections offered by either the Texas Government Code or the Texas Property Code. Considering the nature of the contract

between the Debtor and the County – for the delivery of supplies (*i.e.*, the Material) on an as needed basis – the Court concludes that the Debtor was not a “prime contractor” as that term is defined by the Texas Government Code. *See* TEX. GOV’T. CODE §§ 2253.001(3), (4). Because the Debtor was not a “prime contractor,” the provisions of the Texas Government Code and/or the Texas Property Code are not applicable. *See* TEX. GOV’T. CODE § 2253.027(2); TEX. PROP. CODE § 52.231. Because the contracts between the County and the Debtor and the Debtor and Sioux Aggregates do not fall within either Texas statute, Sioux Aggregates’ actions to collect its prepetition debt violated the automatic stay.

8. Moreover, Sioux Aggregates cannot avail itself of the section 362(b)(3) exception to the automatic stay because that exception applies to property in existence as of the filing date. *See* 11 U.S.C. § 362(b)(3) (exempting from the automatic stay any acts “to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee’s rights are subject to such perfection under section 546(b) of this title . . .”). Here, the funds Sioux Aggregates sought to attach and perfect its liens against did not come into existence until *after* the Debtor filed its bankruptcy case. The section 362(b)(3) exception to the automatic stay does not apply.

9. For either of these reasons, Sioux Aggregates’ actions were in violation of the automatic stay. The County is directed to release to the Debtor the remaining funds owing on the Post-Petition Invoices. Sioux Aggregates shall not interfere with the Debtor’s collection of the remaining amounts owing to it on the Post-Petition Invoices.

10. The Debtor also requests that Sioux Aggregates be required to pay the attorneys’ fees it incurred in prosecuting the Motion. The Texas Government Code provides for a possible



award of attorneys' fees in actions like this one. *See* TEX. GOV'T. CODE §§ 2253.074 ("A court may award costs and reasonable attorney fees that are equitable in a proceeding to enforce a claim on a payment bond or to declare that any part of a claim is invalid."). However, the statute does not mandate an award of attorney's fees to the prevailing party, and neither party in an action under the statute is *entitled* to an award as a matter of right. An award of attorneys' fees or costs under the statute is discretionary with the court. *See S.A. Maxwell Co. v. R.C. Small & Assocs, Inc.*, 873 S.W.2d 447, 456 (Tex. App. 1994, writ denied); *Trinity Universal Ins. Co. v. Fidelity & Casualty Co.*, 837 S.W.2d 202, 205 (Tex. App. 1992, no writ). *See S.A. Maxwell Co.*, 873 S.W.2d at 456.

11. The Court concludes that an award of attorney fees to the Debtor is not appropriate. It appears that Sioux Aggregates and its attorneys believed in good faith that their actions were excepted from the automatic stay. While the Court ultimately disagreed, there is no evidence of bad faith on their part.

12. Any Conclusion of Law may be deemed a Finding of Fact.

13. An Order consistent with these findings and conclusions will be entered separately.

Dated: March 29, 2001.

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**Barbara J. Houser**  
**United States Bankruptcy Judge**